

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Implementation of |) | |
| The Pay Telephone Reclassification |) | CC Docket No. 96-128 |
| And Compensation Provisions of |) | |
| The Telecommunications Act of 1996 |) | |
| |) | |
| RBOC/GTE/SNET Payphone Coalition |) | NSD File No. L-99-34 |
| Petition for Clarification |) | |

REPLY COMMENTS OF IDT CORPORATION

Pursuant to 47 C.F.R. §§ 1.415 and 1.419 and in accordance with the Commission's *Public Notice*,¹ IDT Corporation ("IDT") submits its Reply Comments in response to questions raised in the Commission's *Further Notice of Proposed Rulemaking*.²

INTRODUCTION

In response to its *Public Notice*, the Commission has received comments from parties with vastly different interests regarding per-call compensation. Despite the various positions presented, one argument was made clearly and consistently: the FCC cannot and should not extend the rules adopted in the *Second Order on Reconsideration* as they are unworkable, unfair and unreasonable. Indeed, every major facilities-based interexchange carrier ("IXC") – WorldCom, Inc., Sprint Corporation, AT&T Corp., Qwest Communications International, Inc., WilTel Communications, LLC and Global Crossing North America, Inc. – opposes extending the current rules. Notably, many of

¹ Comment Dates Set For Implementation Of The Pay Telephone Reclassification And Compensation And Compensation Provisions Rulemaking, *Public Notice*, CC Docket No. 96-128, DA 03-1886 (June 3, 2003).

² In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; RBOC/GTE/SNET Payphone Coalition Petition for Clarification,

these IXCs are also payphone service providers (“PSPs”) and, having an opportunity consider the issue from multiple perspectives, have concluded that the current regulations must be revised. Additionally, switch-based resellers (“SBRs”) such as IDT and Telstar International, Inc. and the International Prepaid Communications Association oppose extending the rule. When so many of the industry participants directly affected by the Commission’s rules come before the Commission and say, in effect, “The system is broke, we need to fix it,” the Commission is compelled to do so.

The only commenters that support the current rules are PSPs, such as the American Public Communications Council (“APCC”) and the RBOC Payphone Coalition. However, the reasons given by the APCC and the RBOC Payphone Coalition are based exclusively on their own convenience rather than the law. As such, their arguments fail to address the critical questions in this proceeding, namely: “Whether SBRs are the primary economic beneficiary of their end-users’ calls and, if so, whether the Commission may compel another carrier to pay for such calls, even if administratively efficient?” As demonstrated in IDT’s Initial Comments, as well as by other commenters, SBRs are the primary economic beneficiary of their end-users’ calls and the fact that SBRs provide service via resold facilities rather than their own facilities cannot diminish their rights. Furthermore, the D.C. Circuit has already considered and rejected the Commission’s attempt to force one sector of the payphone industry to pay for calls when another sector receives the economic benefit.³ Finally, as demonstrated by the IXCs comments, the current system is not administratively efficient from either the IXCs or SBRs perspective.

Further Notice of Proposed Rulemaking, CC Docket No. 96-128, NSD File No. L-99-34, FCC 03-119 (May 28, 2003)(“*Further Notice*”).

³ *Illinois Pub. Telecom Ass’n v. FCC*, 117 F.3d 555, 565 (D.C. Cir. 1997)(“*Illinois*”).

For the reasons stated in its Initial Comments, IDT believes the following principles can serve as the foundation for an understandable, efficient and fair per-call compensation process:

- A switch-based reseller is required to pay compensation and provide per-call tracking for calls originated by payphones if the carrier maintains its own switching capability, regardless if the switching equipment is owned or leased by the carrier;
- If a carrier does not maintain its own switching capability, then the underlying carrier remains obligated to pay compensation to the PSP in lieu of its customer that does not maintain switching capability;
- When facilities-based interexchange carriers providing toll free service have determined that they are not required to pay compensation on particular toll free calls because the calls have been routed to a switch-based reseller, the facilities-based interexchange carriers must cooperate with payphone service providers seeking to bill for the resold services;
- The minimum amount of “cooperation” shall entail: stating whether or not the facilities-based interexchange carrier is paying per-call compensation for a particular toll free number and, if it is not, it must identify its switch-based reseller customer by providing its name, address and contact person or department responsible for remitting compensation. Upon providing this minimum amount of cooperation, the facilities-based interexchange carrier shall be relieved of liability for the calls provided to its switch-based reseller customer;
- Where a facilities-based interexchange carrier willfully or recklessly fails to meet the aforementioned amount of cooperation, thus avoiding the requirements of the Payphone Orders and Section 276, the facilities-based interexchange provider shall be liable to the payphone service provider(s) for the per-call compensation of its switch-based reseller customer;
- Where there are multiple switch-based resellers involved, the final switch-based reseller shall have the obligation to pay compensation and provide per-call tracking for calls originated by payphones;
- Where there are multiple switch-based resellers involved, each switch-based reseller’s obligation to provide contact information to a payphone service provider, and the liability that flows

thereunder, shall mirror that of the facilities-based interexchange carrier; and

- Facilities-based interexchange carriers and switch-based resellers liable for per-call compensation may provide tracking, reporting and compensation directly to payphone service providers or via independent third-party clearinghouses.

A compensation process incorporating such principles would provide PSPs with sufficient access to SBRs to arrange for tracking and payment. Moreover, based on IDT's understanding of the IXC's comments, a compensation process that incorporated such principles would be workable from a technical perspective. Most importantly, this system would be permissible from a legal perspective, thus avoiding future legal challenges.

ARGUMENT

Since the purpose of Reply Comments is to respond to contrary arguments, rather than simply restate the agreed upon positions, IDT takes this opportunity to respond to those arguments that seek to maintain the current rules or to revise the rules in a manner inconsistent with the above-stated principles.

Whether SBRs Should Have to Verify That They Have Reliable Payphone Compensation Systems Before Being Permitted to Directly Compensate PSPs⁴

IDT does not support this requirement because it makes SBRs take affirmative steps and rely on the goodwill of IXC to undertake an obligation that IDT asserts is the SBRs by right as the primary economic beneficiary of the toll free call. Aside from this important legal principle, requiring IXC “authorization” before permitting SBR direct payment opens the door to innumerable potential problems. For example, what if the IXC sets difficult or unreasonable requirements before granting approval? This is entirely possible, as IXCs may determine that if they are required to sit in judgment of a SBRs ability to track calls, an IXC may open itself to liability from a PSP if a dispute arises between the PSP and the SBR regarding the SBRs ability to track calls accurately. Thus, the best way to avoid such confusion and potential litigation is prevent it in the first place: make the SBR responsible for its per-call compensation and not subject to judgment or goodwill of the IXC.

This request goes to a much broader issue, namely, whether the Commission should permit SBRs and IXCs to voluntarily agree to have the IXC remit per-call compensation on the SBRs behalf and, if so, what sort of limitations on the terms and

⁴ See, Comments of WorldCom, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; RBOC/GTE/SNET Payphone

conditions of such an agreement might the Commission impose. If the Commission permits SBRs to relieve themselves of their obligation to remit per-call compensation in favor of having IXC's remit on their behalf (and the IXC is willing to enter into such an arrangement), it is not readily apparent how or why the Commission should regulate the IXC/SBR relationship, as such a relationship would be mutually agreed upon, rather than forced, as is presently the case. Other than ensuring that PSPs are notified as to the responsible compensating party and are compensated for all completed calls at no less than the default compensation rate, the relationship between the SBR and IXC may simply be a matter left to SBR and the IXC. While IDT finds it likely that SBRs will not fare well in such negotiations, this is not IDT's concern, as long as SBRs that want to regain the right to compensate PSPs directly – like IDT - are permitted to directly compensate PSPs.

Ultimately, permitting SBR flexibility in this regard may be a workable approach. Indeed, this may be a reasonable compromise for: (1) SBRs that want to compensate PSPs directly; (2) SBRs that do not want to compensate PSPs directly; (3) IXC's that want to be relieved of their current obligation to pay PSPs on behalf of their SBRs; (4) IXC's that are willing to pay PSPs on behalf of their SBRs for favorable terms; (5) PSPs that want more information about SBRs from their IXC providers; and (6) PSPs that want payment directly from IXC's for SBR calls. These numerous interest groups seem to comprise most – if not all – of the interested parties in this proceeding.

Coalition Petition for Clarification, *Further Notice of Proposed Rulemaking*, CC Docket No. 96-128, NSD File No. L-99-34 at 27 – 29 (June 23, 2003) (“WorldCom”).

Whether The Commission Should Impose A “Caller Pays” System⁵

IDT agrees with the Commission’s earlier findings that a “caller pays” system is both unfeasible as a matter of public policy and impermissible as a matter of law.⁶ IDT does not believe “introduc[ing] certainty into the payphone competition industry”⁷ should serve as the basis for such a radical, anti-consumer policy. Moreover, as a procedural matter, IDT does not believe the Commission can implement such a policy as part of this proceeding. Therefore, IDT recommends that the Commission decline to consider a caller pays system – and if it does consider the system - reject such an approach.

Whether IXC’s Should Provide Their SBR Customers’ Call Volume To PSPs⁸

Although IDT recommended such a policy several years ago,⁹ upon further consideration, IDT no longer supports this policy. The information can easily do more harm than good. For example, if a PSP finds that a SBR is compensating PSPs at a low completion percentage, the PSP may use this as a basis for a lawsuit when, in fact, there may be numerous reasons for a low completion rate. The most likely reason for a low

⁵ See, WorldCom at 29 – 33; See also, Comments of Sprint Corporation, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, *Further Notice of Proposed Rulemaking*, CC Docket No. 96-128, NSD File No. L-99-34 at 19 (June 23, 2003) (“Sprint”).

⁶ See generally, First Payphone Order at ¶¶ 85 – 86.

⁷ WorldCom at 34.

⁸ See, Sprint at 21 – 23; See also, Comments of AT&T Corp. In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, *Further Notice of Proposed Rulemaking*, CC Docket No. 96-128, NSD File No. L-99-34 at 9 (June 23, 2003) (“AT&T”); Comments of the American Public Communications Council on Further Notice of Proposed Rulemaking, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, *Further Notice of Proposed Rulemaking*, CC Docket No. 96-128, NSD File No. L-99-34 at 22 – 25 (June 23, 2003) (“APCC”), Comments of Qwest Communications International Inc., In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, *Further Notice of Proposed Rulemaking*, CC Docket No. 96-128, NSD File No. L-99-34 at 12 (June 23, 2003) (“Qwest”).

⁹ Initial Comments of IDT Corporation, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; RBOC/GTE/SNET

completion percentage is that a calling card provider that carries a high percentage of international traffic – particularly traffic to Africa or Latin America – is virtually guaranteed to have a per-call completion percentage that will be miniscule compared to a provider that focuses on the domestic market.

There are other practical and legal reasons not to adopt this requirement. First, PSPs have no right to any information on non-compensable calls. Second, the information contained in the records is confidential between the IXC and SBR and PSPs should not have access to SBRs' confidential information. Most importantly, however, is that non-completed calls are not necessary to realize the goal of fair compensation. PSPs claim they do not collect from SBRs because they do not have the information necessary to contact them. Thus, providing PSPs with SBR contact information is critical to solving the problem. PSPs have not demonstrated that SBRs which remit payment for completed calls underreport their completed calls. Therefore, requiring *any carrier* to provide SBRs' uncompleted calls would require additional costs, create administrative burdens and provide no solution to the problems alleged by PSPs. For these reasons, the Commission should reject such a request.

Whether to Impose Additional Information Requirements¹⁰

IDT does not support Qwest's proposed additional information to be provided to PSPs by IXCs and SBRs. Qwest recommends an annual certification from a corporate officer detailing the number of calls for which a carrier paid compensation and the number of calls the carrier imposed a surcharge upon its customers. This information is of no particular value and will only cause inconvenience. Moreover, IDT is not aware of

Payphone Coalition Petition for Clarification, *Further Notice of Proposed Rulemaking*, CC Docket No. 96-128, NSD File No. L-99-34 at 22 (October 9, 2001) ("IDT Comments").

¹⁰ See, Qwest at 11 - 12.

any other aspect of intercarrier compensation where the Commission compels a sworn statement from a corporate officer attesting to the validity of the accompanying payment. Ultimately, Qwest's proposal should be denied because it sets an undesirable precedent without purpose.

Whether to Impose Surrogates to Determine Call Completion¹¹

IDT does not support the imposition of surrogates for call completion. IDT and numerous other carriers have well documented the legal and practical infirmities of such an approach¹² and even the Commission has concluded that such an approach is fraught with difficulty and litigation.¹³ Indeed, some of the patently ridiculous suggestions offered by APCC – that a call exceeding 15 minutes in length would be subject to two payphone surcharges¹⁴ - have absolutely no basis in the law and are wildly anti-consumer. Similarly, any timing surrogate that would impose charges on calls not answered by the called party runs afoul of various state regulations that prohibit charging consumers for non-completed calls. The only instance where surrogates may be appropriate would be when an SBR responsible for tracking completed calls and remitting per-call compensation fails to do so. In such instances, a surrogate would serve as a means to settle a dispute. IDT recommends that the Commission should rely on the

¹¹ See, Comments of Global Crossing North America, Inc. In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, *Further Notice of Proposed Rulemaking*, CC Docket No. 96-128, NSD File No. L-99-34 (June 23, 2003) (“Global Crossing”) at 3 – 8; APCC at 25 – 30.

¹² See generally, IDT Comments.

¹³ See, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, Bulletins Petition for Clarification, WorldCom, Inc. Petition for Declaratory Ruling and Petition for Reconsideration, AT&T Petition for Clarification and/or Reconsideration, Global Crossing Telecommunications, Inc. Petition for Reconsideration and Clarification, *Third Order on Reconsideration and Order on Clarification*, CC Docket No. 96-128, NSD File No. L-99-34, FCC 01-344 at ¶¶ 7 - 8 (November 21, 2001)(“*Third Order*”).

¹⁴ APCC Comments at 27.

more lawful, acceptable approach of requiring SBRs to remit per call compensation directly to PSPs or via a clearinghouse.

Whether the Commission Should Confirm that A PSP May Not Bypass the IXC and Seek Recovery Directly From the SBR¹⁵

IDT does not necessarily oppose the request made by the JSBRs, as we agree that during the period wherein IXCs have been responsible for their SBR customers' per-call compensation, absent a formal, direct SBR/PSP agreement, no such SBR/PSP obligation may exist. However, IDT takes this opportunity to note that we believe this position is already clear and need not be reaffirmed. Regardless, if the Commission chooses to do so, IDT does not oppose a reaffirmation of the principle.

Whether the First IXC is in the Best Position To Track Payphone Calls and Compensate PSPs¹⁶

The RBOC Payphone Coalition, the APCC and the Commenters' position regarding the ability of IXCs to easily and efficiently serve as administrators for their SBR customers' per-call compensation is contradicted by virtually every statement made by the IXCs. Indeed, to footnote each claim to the contrary by AT&T, MCI, Sprint, etc. would result in a virtual reproduction of each IXCs' Comments. Accordingly, IDT urges

¹⁵ See generally, Comments of Communigroup of K.C., Inc. D/B/A CGR, Communigroup of Jackson, Inc., NTS Communications, Inc., Vartec Telecom, Inc., Transter Communications, Inc. and Centurytel Long Distance, LLC, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, *Further Notice of Proposed Rulemaking*, CC Docket No. 96-128, NSD File No. L-99-34 (June 23, 2003) ("JSBRs")

¹⁶ See generally, Joint Comments, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; RBOC/GTE/SNET Payphone Coalition Petition for Clarification, *Further Notice of Proposed Rulemaking*, CC Docket No. 96-128, NSD File No. L-99-34 (June 23, 2003) ("Commenters"), see also, RBOC Payphone Coalition at 7 – 12; APCC at 11 - 15.

the Commission to defer to the IXC's claims in this regard¹⁷ rather than those of the Commenters.

What those commenters in favor of the status quo are actually arguing is that it is more convenient for PSPs to collect the per-call compensation of SBRs from IXCs rather than the SBR. ("The major collection problems inherent in the dial-around compensation system are multiplied many times over if the pool of carriers from whom PSPs must collect compensation is expanded to include switch-based resellers."¹⁸ ... "By contrast with the old rule, the current rule appropriately relieves PSPs from the *inordinate burden* of collecting compensation from resellers, and places compensation responsibility on *the party best situated to handle it* – the facilities-based IXC.")¹⁹ As demonstrated by Sprint²⁰ and AT&T,²¹ such an arrangement is contrary to *Illinois*, because one group of carriers cannot be compelled to pay for the obligations of another, even if this method is more administratively convenient.²² In conclusion, the Commission's current rules impose obligations upon IXCs to pay compensation for calls where the IXC is not the primary economic beneficiary solely because the Commission concluded it would be more administratively efficient. The IXCs and SBRs have demonstrated that this system has proved to be woefully inefficient and, even if it were efficient, it would remain contrary to *Illinois*. Many IXCs and SBRs have proposed solutions that are truly more efficient and consistent with the Commission's stated principles that the economic beneficiary of a

¹⁷ While IDT certainly takes issue with some of the statements made by IXCs regarding resellers, it serves no purpose to engage in a point-by-point rebuttal. Regardless of the source of conflict and difficulty between IXCs and SBRs, it is clear that such conflict and difficulty exists and the Commission should eliminate the cause: its current per-call compensation rules.

¹⁸ APCC at iii.

¹⁹ APCC at 11 (Emphasis added).

²⁰ Sprint at 23.

²¹ AT&T at 17 – 19.

²² *Illinois Pub. Telecom Ass'n v. FCC*, 117 F.3d 555, 565 (D.C. Cir. 1997).

call is responsible for its cost. The Commission must implement these solutions or risk further litigation of this issue.

Whether the Commission Should “Clarify” That A SBR Must Receive Approval From Its IXC Provider Before Entering Into An Agreement With A PSP²³

IDT does not support this request by the RBOC Coalition. The Commission previously held that SBRs did not require the authorization of their IXC provider to enter into a direct payment arrangement with a PSP,²⁴ therefore, the RBOC Coalition’s request is not a “clarification,” but rather a change in policy. While it is IDT’s position that SBRs should have the right and obligation to pay PSPs directly, if the Commission retains the existing regulations, it should not change them as requested by the RBOC Payphone Coalition. This change would harm SBRs as it would condition their right to enter into direct agreements with PSPs – which the Commission has whole-heartedly supported²⁵ – upon approval by the IXC. Other than providing the IXC notice of a direct SBR/PSP agreement, SBRs should have no further notice obligations. Of course, the very request by the RBOC Coalition is a red herring, as PSPs have almost unilaterally refused to enter into direct payment agreements with SBRs. The only way to ensure direct SBR/PSP payment is to affirmatively require SBRs to compensate PSPs without IXC approval.

Whether The Commission Should Regulate The Rates, Terms And Conditions of IXCs Tracking Expenses²⁶

IDT has demonstrated that at least one major IXC has taken advantage of their ability to recover for tracking costs by explicitly stating that it intends to recover costs

²³ RBOC Payphone Coalition at 14 – 15.

²⁴ See, *Third Order* at ¶ 12.

²⁵ *Id.*

²⁶ See, RBOC Payphone Coalition at 12.

unrelated to tracking through their per-call compensation rate. IDT has also advised the Commission that numerous IXC's have also expressed interest in raising their "tracking costs" to as much as \$0.18 per completed call. IDT urges the Commission to address this issue. Of course, the most effective way for the Commission to do so is to unequivocally state that SBRs have the right to remit their per-call compensation directly to PSPs or via a clearinghouse and IXC's have no right to prohibit SBRs from undertaking this responsibility. If the Commission declines to take this position, in order to prevent abuses in the marketplace, the Commission must prohibit IXC's from recovery of tracking expenses from SBRs, since SBRs – not IXC's – actually track their calls to completion.

CONCLUSION

For the reasons contained in its Initial and Reply Comments, IDT respectfully requests that the Commission explicitly find that: (1) SBRs are the primary economic beneficiaries of their end users' completed calls; (2) per-call tracking and reporting for such calls are the responsibility of the SBR that may not be prohibited by an IXC or PSP; (3) SBRs, like IXCs have the right to provide tracking and compensation directly to PSPs or via a third-party clearinghouse; and (4) PSPs and IXCs have notification and reporting obligations as set forth in IDT's Initial and Reply Comments.

Respectfully submitted,

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Date Filed: July 3, 2003

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